

UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD

**PLANNED LIFESTYLE SERVICES, AFFILIATED
WITH AND RELATED TO, PLANNED COMPANIES,**

Employer

and

Case 22-RC-255558

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ,**

Petitioner

**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
REPORT ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE AND
REQUEST FOR EXTRAORDINARY RELIEF**

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I. INTRODUCTION

On February 3, 2020,¹ the Service Employees International Union, Local 32BJ ("Petitioner"), filed a representation petition with Region 22 of the National Labor Relations Board ("NLRB" or "Board") seeking to represent certain employees of Planned Lifestyle Services, affiliated with and related to, Planned Companies ("Employer"), at its work locations at The Shipyard in Hoboken, New Jersey.²

Pursuant to a Stipulated Election Agreement approved by the Regional Director of Region 22, a secret-ballot election was conducted on February 27 at the Employer's work locations in Hoboken, NJ.³ The tally of ballots revealed a total of *eight votes* for the Petitioner and *six votes* for the Employer. On March 5, the Employer filed timely objections to conduct affecting the results of the election due to Board Agent misconduct on the day of the election. Thereafter, in accordance with Section 102.69 of the Board's Rules and Regulations ("Rules"), the Regional Director ("RD") of Region 29 considered the Employer's objection.⁴ On May 19, the RD overruled the Employer's objection and issued a Certification of Representative for Petitioner.

¹ Hereinafter, all dates refer to 2020 unless noted otherwise.

² The Shipyard has three separate buildings that the Employer services located at 2 12th Street, 1 Walter Berry Independence Court, and 1 14th Street, Hoboken, New Jersey, 07030.

³ The petitioned-for unit included:

All full time and regular part time concierges and front desk employees employed by the Employer at its The Shipyard, Hoboken, New Jersey locations, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

⁴ The Employer believes, in accordance with the NLRB's Casehandling Manual ("CHM"), Part 2, Representation Proceedings, Section 11424.2, that Region 29 investigated its objection since it alleged Region 22 Board Agent misconduct and issued the Report that is the subject of this Request for Review.

The Employer, pursuant to Sections 102.67 and 102.69(c)(2) of the Board's Rules, respectfully submits this Request for Review of the RD's report on objections and certification of representative resulting from the decision to overrule Employer's objection *without a hearing*, as this conclusion is premature and improper. Additionally, the Employer, pursuant to Section 102.67(j)(1)(i) of the Board's Rules, also respectfully submits its Request for Extraordinary Relief in the form of expedited consideration of its request for review.

As demonstrated below, such relief is appropriate and necessary here because of the substantial and material issues present concerning the integrity of the election process and the likelihood of unreasonable interference with employees' free choice on the day of the election. These issues can *only* be resolved through a hearing and, as such, this matter should be remanded back to Region 29 for further processing.

II. RELEVANT FACTUAL BACKGROUND

There were three voting sessions established for the election on February 27. The third voting session was scheduled from 5:30 PM to 7:30 PM. During the pre-election conference immediately preceding the third voting session, the Board Agent conducting the election presented a marked-up Voter List for inspection by representatives of the Employer and Petitioner. The Voter List shown to the parties was marked to reflect all employees who had already voted in the election up to that point, and the parties had ample opportunity to review the Voter List and observe who had *not yet* voted. During this third and final voting session, at least four employees appeared to vote, which ultimately resulted in the Petitioner winning the election by a close margin of eight to six votes.

The Employer argues that the Petitioner may have used the Voter List information inappropriately divulged by the Board Agent during the third and final pre-election conference to

contact those employees who had not yet voted and urged them to vote, which, given the close margin of the election, may have tipped the results in the Petitioner's favor. In this regard, the Board Agent's misconduct – which the Employer could corroborate at hearing by way of multiple witnesses – was impermissible and compromised the integrity of the Board's processes, thereby destroying the laboratory conditions necessary for conducting a fair and valid election.

As described in its Objections and accompanying Offer of Proof, the Employer requested that the results of the February 27 election be set aside for the aforesaid reasons or, in the alternative, that the RD order a hearing to address the Employer's objection to conduct affecting the results of the election. Ultimately, the RD for Region 29 overruled the Employer's objection *without a hearing*, thereby unduly denying the Employer of an opportunity to further substantiate and prove its case. In so doing, the RD explained its reasoning as follows:

If the allegations stated in the objection is true, the Board Agent erred by showing the parties the marked voter list. However, the Employer has not shown that the Board Agent's conduct raised a reasonable doubt about the fairness or validity of the election. Although the Employer states that the parties had an opportunity to view the marked voter list, the Employer has presented no evidence that the Petitioner engaged in any conduct as a result of viewing the marked list. There is no evidence that the Petitioner made a list of voters who had voted, contacted any voters after the viewing the list or engaged in any other conduct that could have impugned the integrity or validity of the election. The Employer's offer of proof is not sufficient in this case.

RD Report at 3.

The Employer respectfully argues that the RD committed prejudicial error in denying the Employer a hearing at which it could confirm the Board Agent's misconduct and establish that the Petitioner did contact voters after viewing the marked-up Voter List.

III. STANDARD UPON WHICH TO SEEK BOARD REVIEW OF REGIONAL DIRECTOR ACTION

Under Section 102.67(d) of the NLRB's Rules, the Board will grant a party's request for review of a Regional Director's action only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Here, it is appropriate for the Board to grant review of the RD's action in overruling the Employer's objection without a hearing. The RD's ruling to deny the Employer a hearing on its objection constitutes prejudicial error. Moreover, there is a substantial question of law and policy raised by a departure from Board precedent under our unique and particular set of facts. To this end, and in consideration of these circumstances jeopardizing the reliability of the Board's election process, the Employer asserts that the RD erred in overruling its objection without a hearing.

IV. THE EMPLOYER’S OBJECTION REQUIRED A HEARING BECAUSE THE BOARD AGENT’S MISCONDUCT COMPROMISED THE INTEGRITY OF THE ELECTION PROCESS AND CASTED REASONABLE DOUBT AS TO THE FAIRNESS AND VALIDITY OF THE FEBRUARY 27 ELECTION

Under Section 102.69(c)(1)(ii) of the Board’s Rules, a Regional Director must order a hearing on objections when it “determines that the evidence described in the accompanying offer of proof *could be grounds* for setting aside the election if introduced at a hearing.” (Emphasis added.) The Employer’s evidence describing the Board Agent’s misconduct undoubtedly could be grounds for setting aside the election if presented and advanced at a hearing. In fact, it is *only with a hearing* where the Region can unequivocally determine whether the Petitioner took advantage of the Board Agent’s error to contact employees who had not yet voted.

The Board has long held that an objection relating to the integrity of the election process requires an assessment of whether the facts indicate “a reasonable possibility of irregularity inhered” in the conduct of the election. Peoples Drug Stores, Inc., 202 NLRB 1145, 1145 (1973). Indeed, as the Board put it in New York Telephone Co., 109 NLRB 788, 790–91 (1954):

The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question. Where . . . the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining our standards there appears no alternative but to set this election aside and to direct a new election.

As further noted in numerous Board decisions, the conduct of Board Agents when conducting elections must be *beyond reproach*. Where improper conduct is attributed to a Board Agent, the appropriate question is whether “the manner in which the election was conducted raises a reasonable doubt as to fairness and validity of the election.” Polymers, Inc., 174 NLRB 282, 282 (1969). The Board has also stated that an election must be set aside “when the conduct

of the Board election Agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain.”

Sonoma Health Care Center, 342 NLRB 933, 933 (2004).

Here, at least four employees submitted ballots during the third and final voting session at the February 27 election. In an election where the Petitioner prevailed by a *narrow* margin of eight to six votes, these four votes – at a minimum – following the Board Agent’s misconduct is material and outcome determinative. The Board Agent showing the parties the marked-up Voter List (which can be corroborated at hearing by multiple witnesses), and thus disclosing the identities of those employees who had not yet voted, raises reasonable doubt as to the fairness and validity of the election, inasmuch as the Petitioner may have used this information to selectively “turn out” the vote of those employees who had not yet voted. See Sonoma Health Care, 342 NLRB at 933; Athbro Precision Engineering Corp., 166 NLRB 966, 966 (1967) (the Board “must maintain and protect the integrity and neutrality of its procedures[,]” and a Board Agent's conduct must not “tend[] to destroy confidence in the Board's election process, or . . . reasonably be interpreted as impugning the election standards [the Board] seek[s] to maintain”).

A hearing is necessary under these circumstances where a Board Agent’s misconduct – which the RD admitted was problematic if true (it is and can be substantiated) – is in itself destructive of the high Agency standards kept for conducting elections. Importantly, a hearing is also necessary to determine whether the Petitioner did in fact exploit the improper disclosure of the names of employees who had not yet voted, especially in light of the narrow vote.⁵ The RD

⁵ See Masonic Homes of California, 258 NLRB 41, 48 (1981) (“The Board and courts long have held that voting in Board cases must be free of any impropriety, and that employees must be permitted to cast their ballots in secret, *in complete freedom*, and without fear of reprisal or discipline. Activity that reasonably can be construed as improper is proscribed whether or not the activity is, in fact, improper.”) (Emphasis added.)

appears to be requesting that the Employer conduct full, *pre-hearing* discovery of the Petitioner and its employees, notwithstanding the NLRB's own limitations in terms of evidence when investigating objections prior to a hearing.⁶

For the RD to require the Employer to produce evidence of Petitioner communications with voting employees as a condition of granting a hearing is improper and untenable. First, the Petitioner is *not* going to willingly inform the Employer that it saw the names of employees who had not yet voted when the Board Agent inappropriately displayed the Voter List, and that it then leveraged that information to turn out additional votes during the third and final voting session. Next, the Employer would face legal risk in asking its employees *who voted* in the final voting session, since this could be perceived and alleged as interrogating them about their votes and likely trigger an unfair labor practice charge against the Employer. The RD's decision to overrule the objection without a hearing puts the Employer in a no win, "Catch-22" situation by default with no apparent remedy. The *only solution* here is to hold a hearing.

A hearing is the *only way* to confirm whether the election satisfies the "laboratory conditions" required for a fair and valid election. If the Petitioner and employees testify under oath that nothing objectionable occurred following the Board Agent's untoward actions, then, arguably, it is proper to issue certification of the Petitioner.⁷ If, on the other hand, hearing evidence reveals that the Petitioner leveraged the Board Agent's error to turn out several more

⁶ NLRB CHM, Part 2, Section 11391.1, states, in relevant part, "regional directors should not conduct investigations where affidavits are taken before deciding whether to set objections for hearing."

⁷ This, however, assumes that the Board Agent's misconduct – by itself – is not sufficient to order a hearing, and ultimately overturn the election results and order a new one. Based on the foregoing Board precedent and the facts at hand, the Employer respectfully argues that it is.

votes during the third and final voting session, the Board should set aside the February 27 election and direct a new election free from unlawful conduct.

A hearing is *required* under these circumstances to evaluate whether the Board Agent's misconduct improperly interfered with the election process. The Board has approved of ordering hearings under similar circumstances. See Kerr-McGee Chemical Corp., 311 NLRB 447, 447 (1993) (Board held that directing a hearing to "aid us in determining on which side of the line drawn by our case law this case falls" was appropriate). Notably, former Board Chairman Philip A. Miscimarra's analysis in Jacmar Food Service Distribution, 365 NLRB No. 35, slip op. at 1 (2017) (dissenting, in part), is applicable here and reinforces the Employer's argument for needing a hearing.

In Jacmar Food Service, the former Chairman believed a hearing was necessary *prior to* the Regional Director overruling an Employer's objection based on Board Agent misconduct. He stated, in pertinent part, that despite "the information provided by the Employer at this stage involves nothing more than mere allegations" and the fact that the "Regional Director and [] Board may ultimately conclude that the objections have no evidentiary support," the Board "has a long history of conducting representation elections in a fair and even-handed manner." Id. To this end, former Chairman Miscimarra continued and found that the Board's "track record instills confidence in the integrity of our elections. It warrants vigilance when ... certain aspects of the election are alleged not to have been conducted in a fair and regular manner."

For these same reasons, the Employer believes a hearing is warranted in this case prior to the RD overruling its objection and respectfully requests this relief.

V. THE EMPLOYER’S REQUEST FOR EXTRAORDINARY RELIEF

Under Section 102.67(j)(1)(i) of the Board’ Rules, a party “requesting review may also move in writing to the Board” for the expedited consideration of its request. A request for extraordinary relief will only be granted upon a clear showing that it is necessary under the particular circumstances of the case. Id. at 102.67(j)(2).

Immediately following the Certification of Representative issued by the RD, the Petitioner served a request for information (“RFI”) upon the Employer.⁸ The Employer exposes itself to unfair labor practice liability if it refuses to respond to Petitioner’s RFI, and, as such, is *not* taking that course of action. However, such Certification would not yet have issued – if at all, possibly – had the RD correctly decided to direct a hearing on the Employer’s objection. While the RD was permitted to certify the February 27 election results despite a pending or possible request for review, such conduct is premature, unnecessarily wastes both Employer and Petitioner resources (as the Certification may ultimately be revoked by the Board), and, generally, is a rule that will – likely – be revised in the near future.⁹ The Employer respectfully submits that these circumstances warrant expedited review of its request.

VI. CONCLUSION

For the reasons set forth above, the Employer respectfully submits that its Request for Review and Request for Extraordinary Relief be granted and a hearing be ordered to address its

⁸ Counsel for the Petitioner sent undersigned counsel an email dated May 22, 2020, in which counsel specifically references the Certification in support of its demand for information.


⁹ The timing of Regional Directors issuing certifications of representatives was modified by the Board’s new representation case rules, set to take effect on May 31, 2020. However, due to a May 30 U.S. District Court order in AFL-CIO v. NLRB, Civ. No. 20-CV-0675, this portion of the Board’s new rules was enjoined for the time being.

objections to the February 27 Election, thereby also revoking the Certification of Representative previously issued for Petitioner.

Respectfully Submitted,

Dated: June 2, 2020

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CERTIFICATE OF SERVICE

In accordance with the Board's Rules and Regulations ("Rules"), Sections 102.5 and 102.67(i)(2), and GC Memo 20-01, it is hereby certified that on this day the Employer's Request for Review of the Regional Director's Report on Objections and Certification of Representative and Request for Extraordinary Relief in Case No. 22-RC-255558 was electronically filed with the Agency. It is further certified that on this day the same document was also filed with the Regional Director and served via email in accordance with the Board's Rules on the following party representative:

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Dated: June 2, 2020



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